IN THE MISSOURI SUPREME COURT

MARY CATHERINE LOWDERMILK, et al.,	)	
Appellants,	)	**No. SC84737**
vs.	)	
VESCOVO BUILDING AND REALTY COMPANY, INC., et al.,	)	
Respondents.	)	

On Appeal From The Twenty-First Judicial Circuit
State of Missouri

BRIEF OF APPELLANTS

STINSON MORRISON HECKER LLP
Don M. Downing, MO Bar #30405
Sandra J. Wunderlich, MO Bar #39019
Carrie Mulholland Brous, MO Bar #44920
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Phone: (314) 259-4500
Fax: (314) 259-4599

ATTORNEYS FOR MARY CATHERINE LOWDERMILK, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF GREGORY A. LOWDERMILK

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JURISDICTIONAL STATEMENT

In this action, a jury awarded Appellants Mary Catherine Lowdermilk and the Estate of Gregory Lowdermilk ("Appellants") compensatory and punitive damages for negligent omission and negligence *per se* in connection with Respondents' failure to disclose material defects in a home that Appellants purchased. Legal File ("L.F.") at 340-343. After a jury verdict for Appellants, the trial court entered judgment on the verdict. The judgment is attached hereto in the Appendix ("App") at 1-4. Respondents Vescovo Building & Realty Co., Inc., Gary Vescovo and Robert Vescovo (the "Vescovo Respondents") filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial. L.F. at 344-350. Respondents Gordon A. Gundaker Real Estate Co., Inc., Beth Gundaker-Lisk and Larry Wilson, Jr. (the "Gundaker Respondents") filed a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, and Motion for Remittitur. L.F. at 351-360. The circuit court granted Respondents' Motions for New Trial, denied Respondents' other post-trial motions, and entered its final Order on January 18, 2001. L.F. at 423-424. The court's Order is attached hereto. App. at 5-6. Appellants timely filed their Notice of Appeal on January 26, 2001. L.F. at 425-431. The Court of Appeals for the Eastern District affirmed the trial court's order and Appellants timely filed an Application for Transfer to this Court. This Court granted Appellants' Application for Transfer and ordered this case transferred pursuant to Article V, section 1 of the Missouri Constitution and Missouri Rule of Civil Procedure 83.04 to determine issues of general interest and importance related to the Legislature's enactment of Missouri Revised Statutes 339.710-339.860.

STATEMENT OF FACTS[1]

I. Construction of the House at 118 Glen Road

Beginning in the fall of 1997 and continuing through 1998, the Vescovo Respondents built a house at 118 Glen Road in Webster Groves, Missouri. Trial Transcript ("Tr.") III-V at 344.[2] During the construction process, the Vescovo Respondents failed to damp proof the exterior of the foundation walls. L.F. EXH. at 6; Tr., 9/27/00 at 11-12. The failure to damp proof the exterior of the foundation walls is a violation of the building codes adopted and enforced by the City of Webster Groves, Missouri. Tr., 9/27/00 at 11-12. There were many other errors and omissions in the construction of the house including: the failure to install tar paper under the roof shingles, which is also a code violation in the City of Webster Groves; the failure to properly support one wall of the house; the failure to properly install the front porches, etc. Tr., 9/27/00 at 78-79. While the house was under construction, a neighbor, Mr. Gene Kiernan, walked by the house and observed some of these errors and omissions

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[1] Because judgment was entered in favor of Appellants following a jury verdict in their favor, the facts are set forth here in a light most favorable to the jury's verdict. *See Bodimer v. Ryan's Family Steakhouses, Inc.*, 978 S.W.2d 4, 8 (Mo. Ct. App. 1998).

[2] Citations to the transcript will designate the volume number, i.e., Tr., II at 1, or the date on which it was taken for references to that portion of the transcript that is not assigned a volume number, i.e., Tr., 9/27/00 at 1.

in the construction process. Tr. I-II at 364, 366-372. Mr. Kiernan specifically observed that the exterior of the foundation had not been damp proofed. Legal File Exhibits ("L.F. EXH.") at 6.

Mr. Bill Buchanan, a neighbor who lived in the house next to 118 Glen Road observed the construction process as well. Tr., 9/27/00 at 229. One day, while Mr. Buchanan was in his yard, the backhoe operator came to the property. Tr., 9/27/00 at 229. One of the Vescovo Respondents, Robert Vescovo, also came to the property that day. The back hoe operator remarked to Mr. Buchanan that the damp proofing had not been done yet. Following a conversation with Mr. Robert Vescovo at the site, the backhoe operator began to backfill the dirt around the foundation even though the damp proofing had not been done. Tr., 9/27/00 at 229-231.

II. Mr. Kiernan's Letters

In the spring of 1998, the Vescovo Respondents had entered into a sales agreement with Janet McAfee Realtors to market the property. Tr. I-II at 481. Mr. Kiernan wrote a letter to Ms. Vicki Kirk, the agent at Janet McAfee Realtors who represented the Vescovo Respondents. Tr. I-II at 374, 481, 507; L.F. EXH. at 5-7. In this letter, Mr. Kiernan informed Ms. Kirk of the Vescovo Respondents' failure to damp proof the exterior of the foundation among other things. Tr. I-II at 378-379, 507-508; L.F. EXH. at 6, 9. There is no question that this letter was received by Ms. Kirk. Tr. I-II at 483-508. In addition, upon learning of the names of the contractors who were building the house, Mr. Kiernan sent a similar letter to the Vescovo Respondents to notify them that there were errors and omissions in the construction process, including the failure to damp proof the exterior of

the foundation. Tr. I-II at 378-379, 507-508; L.F. EXH. at 6, 9. This letter was sent by certified mail and received by the Vescovo Respondents. Tr. I-II at 385, III-V 443, 479. Mr. Kiernan's stated purpose in sending the letters was to inform the builders and the real estate agent of the errors and omissions that he observed so that this information would be disclosed to a potential purchaser who would not be aware of the problems. L.F. EXH. at 5, 8.

Ms. Kirk informed her boss, Ted Thornhill, also of Janet McAfee Realtors, that she had received the letter. Tr. I-II at 483. Mr. Thornhill discussed the letter with Mr. Robert Vescovo. Tr. I-II at 484. Mr. Thornhill specifically inquired about whether the exterior of the foundation had been damp proofed. *Id*. at 485. Mr. Vescovo insisted that it had been done. Tr. I-II at 485. Mr. Robert Vescovo explained that the tarry substance had not been sprayed high enough to see it. Tr. I-II at 485. Despite this denial, Janet McAfee insisted on disclosing the letter to prospective purchasers. Tr. I-II at 486-487.

III. Gundaker's Representation of the Vescovo Respondents

Eventually the listing agreement with Janet McAfee expired before the house sold. Tr. I-II at 481. In September of 1998, the Vescovo Respondents entered into a written marketing agreement with Gundaker ("Agreement") whereby Gundaker, through its agents Beth Gundaker-Lisk and Larry Wilson, agreed to represent the Vescovo Respondents as seller's agents to market the house. Tr. III-V at 470-472; L.F. EXH. at 85-86. The Agreement provided that Gundaker was the exclusive agent of the Vescovo Respondents. L.F., EXH. at 85; Tr. III-IV at 522-23; 560. The Agreement also set forth

the terms upon which Gundaker would receive a commission. L.F. EXH. at 87. The Agreement between the Vescovo Respondents and the Gundaker Respondents listed Gundaker's address as 2458 Old Dorsett Road. L.F. EXH. at 86. Before signing the Agreement, Robert Vescovo told Mr. Wilson about the letter from Mr. Kiernan that had been sent to both Ms. Kirk and to the Vescovo Respondents. Tr. III-IV at 448-449. Robert Vescovo discussed the letter and its contents with Mr. Wilson. *Id.* After the parties signed the marketing agreement, a sign offering the property for sale through Gundaker was placed in the front yard of the residence. Tr. III-V at 524.

IV. Gundaker's Receipt of the Letter from Mr. Kiernan

Mr. Kiernan observed that the sign in the yard of the residence changed to indicate that the house was being offered for sale through Beth Gundaker-Lisk of Gundaker. Tr. I-II at 379-380, III-V 524. Mr. Wilson's name was not on the sign in the yard at 118 Glen Road. Tr. III-V at 524, 570. Mr. Kiernan contacted the Gundaker office listed on the sign to verify Ms. Gundaker-Lisk's correct mailing address. Tr. I-II at 383. The telephone number listed on the sign at 118 Glen called by Mr. Kiernan rang at the New Homes Division of Gundaker at 2458 Old Dorsett Road, Maryland Heights, Missouri 63043. Tr. III-V at 524. Mr. Kiernan's call was routed to Mr. Wilson in Gundaker's New Homes Division. Tr. I-II at 384.

Mr. Wilson confirmed that the correct mailing address for Ms. Gundaker-Lisk was at the New Homes Division of Gundaker, 2458 Old Dorsett Road, Maryland Heights, Missouri 63043. Tr. I-II at 384-385. At the time of this telephone conversation, Ms. Gundaker-Lisk's Missouri Real Estate Commission license was registered at

Gundaker's New Homes Division at 2458 Old Dorsett Road in St. Louis, Missouri. Tr. III-V at 525-526. The certificates of licensure from the Missouri Real Estate Commission for both Mr. Wilson and Ms. Gundaker-Lisk list 2458 Old Dorsett Road as their business address. L.F. EXH. at 44, 45.

During the telephone conversation with Mr. Wilson, Mr. Kiernan and Mr. Wilson discovered that they knew each other. Tr. III-V at 557. They had a brief conversation about their families. *Id.* Mr. Wilson never told Mr. Kiernan that he was a co-agent on the house at 118 Glen Road. Tr. I-II at 384. Following his telephone conversation with Mr. Wilson, Mr. Kiernan wrote a cover letter to Ms. Gundaker-Lisk. L.F. EXH. at 11. In this cover letter, he mentioned his conversation with Mr. Wilson and explained that he had verified her address. L.F. EXH. at 11. Mr. Kiernan attached a copy of the letter that he had previously sent to Ms. Kirk at Janet McAfee. Tr. I-II at 383. This letter outlined the errors and omissions that Mr. Kiernan had observed, including the fact that the exterior of the foundation had not been damp proofed. L.F. EXH. at 11-15.

Mr. Kiernan addressed the envelope to Ms. Gundaker-Lisk at the address that Mr. Wilson had provided. Tr. I-II at 384-385; L.F. EXH. at 11. Mr. Kiernan placed the letter in an envelope and sealed it. Tr. I-II at 385. Mr. Kiernan placed the proper postage on the envelope and put his return address on the envelope. *Id.* Mr. Kiernan placed the letter in the United States mail. *Id.* Mr. Kiernan has never received the letter back. *Id.*

If mail for Ms. Gundaker-Lisk was received at Gundaker's corporate headquarters, the receptionist would route the mail to the secretary for the New Homes Division. Tr. I-II at 500-501. The New Homes secretary would give the mail to the sales representative

for Ms. Gundaker-Lisk. *Id.* In September of 1998, Mr. Wilson was the sales representative for Ms. Gundaker-Lisk. Tr. III-V at 502-503.

Gary Vescovo admitted that he discussed the letter from Mr. Kiernan with Mr. Wilson prior to the closing of the sale to plaintiffs. Tr. III-V at 480. Gary Vescovo also spoke with Gundaker-Lisk's husband, Mike Lisk, about the letter from Mr. Kiernan and told Gundaker-Lisk's husband to tell Gundaker-Lisk about the letter. Tr. III-V at 480-481.

V. Appellants' purchase of the house

In October of 1998, Appellants viewed the house and decided to make an offer to purchase the house. Tr. I-II at 271, 274. At no time did the Vescovo Respondents or the Gundaker Respondents notify Appellants that the exterior of the foundation had not been damp proofed. Tr. I-II at 279. Nor did they inform Appellants of any other errors and omissions in the construction process. *Id.* They did not even tell Appellants about the letter they had all received from Mr. Kiernan. *Id.*

Appellants purchased the house on December 18, 1998 for $560,000. Tr. I-II at 275, 278; L.F. EXH. at 1-4. Appellants would not have purchased the house had they known that the exterior of the foundation had not been damp proofed. Tr. I-II at 296. Not only because this was a code violation but because it was a strong indication as to the quality of the construction of the whole house. Tr. I-II at 296.

Shortly after Appellants moved in, they learned from Mr. Kiernan about the problems with the house, including the failure to damp proof the foundation. Tr. I-II at 279, 281. They also learned about the letters that Mr. Kiernan had sent to the Vescovo

Respondents and the Gundaker Respondents. Tr. I-II at 282-283. Appellants requested that the Vescovo Respondents damp proof the exterior of the foundation or buy back the house, but they refused. Tr. I-II at 287, 292.

VI. The Lawsuit

Appellants filed suit against all Respondents in May of 1999. L.F. at 2. Appellants filed suit against the Vescovo Respondents for breach of implied warranty in a new home, negligence per se, intentional misrepresentation, fraudulent omission, negligent misrepresentation, negligent omission, and unjust enrichment. L.F. at 26-55. Appellants filed suit against the Gundaker Respondents for negligence per se, unjust enrichment, fraudulent omission, and negligent omission. *Id.* The case proceeded to trial in September of 2000.

VII. Errors and Omission in the Construction of the House

Until the code violations were corrected at this house, including damp proofing the foundation and placing tar paper under the roof and installing valley flashings, the City of Webster Groves refused to issue an occupancy permit. Tr., 9/27/00 at 13. To damp proof the exterior of the foundation at this stage required that the dirt from around the foundation be excavated and cleaned before damp proofing material could be applied. Tr., 9/27/00 at 86. In addition, the porches, patios, and steps had to be removed and reinstalled to reach all of the foundation walls. *Id.* at 86-87. There were other problems with the house including a code violation related to the failure to install tar paper and valley flashings under the shingles. *Id.* at 85-86.

VIII. Damages Recoverable by Appellants

One of Appellants' expert witnesses, Mr. Foreman, was knowledgeable in the areas of construction and costs of repair. Tr., 9/27/00 at 43-44. Mr. Foreman testified that the house was not built in a workman like manner and provided an estimate for each item to be repaired. Tr., 9/27/00 at 79-80. Mr. Foreman relied upon a manual that provides an itemized list of costs appropriate for the St. Louis area to correct each error and omission in construction. Tr., 9/27/00 at 84. In addition, Mr. Foreman contacted three contractors to get estimates about the cost of the repairs that needed to be made. *Id.* Mr. Foreman testified that in his opinion, the total cost to correct the errors and omissions identified above was $182,890. Tr., 9/27/00 at 84-94. None of the Respondents called an expert witness to testify about the cost of repair.

Appellants' other expert, Susan Schiff, was knowledgeable about the real estate market and the true value of the house on the date of sale given the existence of these errors and omissions in the construction process. Tr. III-IV at 1-3. Ms. Schiff confirmed that $560,000 was an appropriate price to pay for the house in December of 1998 had it been as represented to the Appellants with no errors or omissions in the construction. Tr. III-V at 7-8, 20. Ms. Schiff explained that the existence of the errors and omissions in the construction of the house on the date of the sale would result in a much lower value than the amount paid by the Appellants. Tr. III-V at 15-17. Ms. Schiff explained that a buyer would want to reduce the cost of the house by the cost of the repairs that would need to be made plus an additional amount because the buyer would be suspect of a house needing such repairs. Tr. III-V at 11-17. Ms. Schiff stated that the code violations

would be of concern to buyers who might otherwise be interested in the house, and that buyers would expect a home in this price range to be at least up to code. Tr. III-V at 11, 17. Ms. Schiff testified that the market value of the house at the time of sale was actually $339,000 rather than $560,000 due to the repairs that would need to be completed before the house could be sold to another purchaser. Tr. III-V at 17-20. She determined actual value by subtracting the cost of repairs from the value of the house had it been as represented to Appellants with no errors and omissions ($560,000 - $182,000 = $377,110) and Ms. Schiff then subtracted an additional 10% of the remaining figure to determine the true value of the house. Tr. III-V at 17-20. Ms. Schiff testified that that the 10% reduction was very conservative and that the value may be even lower depending upon how a buyer reacted to the code violations and the fact that an occupancy permit could not be issued. Tr. III-V at 18. Ms. Schiff concluded that the difference between the value of the house with the defects and the value of the house without the defects was approximately $220,000. Tr. III-V at 20. Ms. Schiff offered the only opinion on this issue.

Even the real estate appraiser called by the Vescovo Respondents' agreed with Ms. Schiff that the market reaction to the errors and omissions would likely be greater than the cost to repair. Tr. III-V at 304-306. The Vescovo Respondents offered no opinion as to the value of the house as represented to Appellants or the actual value of the house in December 1998, the date it was sold to Appellants. *Id.* at 301-302. The Gundaker Respondents did not offer any testimony with respect to value at trial.

IX. Jury Instructions and Closing Argument

The verdict director against the Vescovo Respondents stated as follows:

> Your verdict must be for [Appellants] against [Vescovo Respondents] if you believe:
>
> First, [Vescovo Respondents] had superior knowledge whether the exterior of the foundation of the house at 118 Glen Road had been damp proofed; and
>
> Second, the exterior of the foundation of the house at 118 Glen Road had not been damp proofed; and
>
> Third, [Vescovo Respondents] failed to disclose this information to [Appellants]; and
>
> Fourth, [Appellants] did not know and in the exercise of ordinary care could not have known that the exterior of the foundation of the house at 118 Glen Road was not damp proofed; and
>
> Fifth, [Appellants'] lack of knowledge of the failure to damp proof the exterior of the foundation of the house at 118 Glen Road was material to their purchase of the house; and
>
> Sixth, as a direct result of [Vescovo Respondents'] failure to disclose that the exterior of the foundation of the house at 118 Glen Road had not been damp proofed, [Appellants] were damaged.

L.F. 305-307. The verdict director against the Gundaker Respondents stated as follows:

> Your verdict must be for [Appellants] and against [Gundaker Respondents] if you believe:

First, [Gundaker Respondents] knew, or should have known, that the exterior of the foundation of the house at 118 Glen Road had not been damp proofed; and

Second, this information would have been material to [Appellants'] purchase of the house at 118 Glen Road; and

Third, [Gundaker Respondents] failed to disclose this information to [Appellants]; and

Fourth, as a direct result of such conduct, [Appellants] sustained damages.

L.F. 308-310. Finally, the jury instruction given to calculate the amount of compensatory damages that Appellants were entitled to recover was modeled after MAI 4.03. It stated as follows:

If you find in favor of the [Appellants], then you must award [Appellants] such sum as you believe was the difference between the actual value of the house on the date it was sold to [Appellants] and what its value would have been on that date had the house been as represented by [Respondents].

L.F. at 312.

During the instruction conference, none of the Respondents requested a limiting instruction or made a motion to withdraw any evidence from the jury's consideration. Tr. III-V at 576-590. Pursuant to the language in MAI 4.03, during closing argument counsel for Appellants argued that it was up to the jury to determine the value of the house on the date it was sold to Appellants now that all of the errors and omissions in the construction process could be taken into account. Tr. III-V at 605-609. Appellants'

counsel argued that the jury should award Appellants the difference between the value of the house as represented and the value of the house with all of the known code violations and defects. *Id.* at 604-605. In response, none of the Respondents objected. Instead, counsel for the Vescovo Respondents accepted liability for certain errors and omissions in the construction that were identified by Appellants' expert, including the code violations related to damp proofing the exterior and repairing the roof, as well as the cost to restructure and repair the front porches, the cost to regrade and reseed the lawn, and the cost to tighten the anchor bolts. Tr. III-V at 621-23 and 625.

X. Jury's Verdict

After a six-day trial, the jury found that the Respondents knew or should have known that the exterior of the house's foundation had not been damp proofed, but none of the respondents disclosed this information to Appellants prior to their purchase of the house. L.F. at 305-310. The jury found both the Vescovo Respondents and the Gundaker Respondents liable for misrepresentation in that they failed to disclose this fact to Appellants. L.F. at 305-310, 334-337. The jury found that the Vescovo Respondents and the Gundaker Respondents were jointly and severally liable for the harm caused to the Appellants for this misrepresentation and assessed compensatory damages at $140,000. L.F. at 305-310, 335. In addition, the jury awarded $100,000 in punitive damages against Vescovo Building and Realty, $50,000 against Robert Vescovo, $50,000 against Gary Vescovo, $40,000 against the Gordon A. Gundaker Real Estate Company, $20,000 against Mr. Wilson and $20,000 against Ms. Gundaker-Lisk. L.F. at 334-339.

After the Court entered judgment for Appellants on the jury's verdict, the Vescovo Respondents filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial. L.F. at 344-350. The Gundaker Respondents filed a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, and Motion for Remittitur. L.F. at 351-360. In their motions for new trial, Respondents contended that Appellants were not entitled to recover damages attributable to errors and omissions in the construction of the house other than the failure to damp proof the exterior of the foundation. L.F. at 344-360. The trial court granted a new trial for all Respondents based upon its belief that the jury awarded damages for defects other than the failure to damp proof the foundation because the verdict directing instructions only required the jury to find that the Respondents failed to disclose the failure to damp proof the foundation to assess liability against the Respondents. App. at 5-6. In addition, in their motion for judgment notwithstanding the verdict, motion for new trial and Motion for Remittitur, the Gundaker Respondents asserted that the trial court erred in submitting Instruction Numbers 10, 11 and 12 to the jury based upon appellants' claim of negligence *per se* for three reasons. First, the Gundaker Respondents alleged that the provisions of Chapter 339 of the Missouri Revised Statutes did not authorize an action for negligence *per se.* L.F. at 352. Second, the Gundaker Respondents claimed that the verdict directing instruction should have "required an element of scienter" to properly state a claim for negligent omission. L.F. at 353. Finally, the Gundaker Respondents asserted that the verdict directing instruction imposed a duty of discovery or investigation upon the Gundaker Respondents, which they assert is specifically excluded by Mo. Rev. Stat.

section 339.730 (1997), or alternatively, it allowed the jury to impose vicarious liability, which they claim is specifically excluded by Mo. Rev. Stat. section 339.810 (1998). *Id.* The trial court granted the Gundaker Respondents' motion for a new trial without identifying which of these bases it relied upon. App. at 5-6. Appellants filed this appeal. L.F. at 425-429.

POINTS RELIED ON

I. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENCE *PER SE* FOR VIOLATIONS OF MISSOURI REVISED STATUTES SECTIONS 339.710-339.860 IN THAT THE PLAIN LANGUAGE OF THE STATUTES DEMONSTRATE AN INTENT BY THE LEGISLATURE TO HOLD THE GUNDAKER RESPONDENTS LIABLE FOR VIOLATIONS OF THE STATUTES, APPELLANTS ARE WITHIN THE CLASS OF PERSONS THAT THE STATUTES WERE DESIGNED TO PROTECT AND THE HARM COMPLAINED OF IS THE TYPE OF HARM THAT THE STATUTES WERE INTENDED TO PREVENT, THE STATUTES CONTAIN NO OTHER MEANS OF ENFORCEMENT AND A NEGLIGENCE *PER SE* ACTION WOULD FURTHER THE PURPOSES OF THE LEGISLATION AND ENSURE ITS EFFECTIVENESS.

Missouri Revised Statutes sections 339.710-339.860

*Johnson v. Kraft General Foods, Inc.,*885 S.W.2d 334, 336 (Mo. 1994) (en banc)

Imperial Premium Finance, Inc. v. Northland Ins. Co., 861 S.W.2d 596, 599 (Mo. Ct. App. 1993)

Monteer v. Prospectors Lounge, Inc., 821 S.W.2d 898, 900 (Mo. Ct. App. 1992).

II. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENCE *PER SE* FOR VIOLATIONS OF MISSOURI REVISED STATUTES SECTIONS 339.710-339.860 IN THAT THE LOWER COURTS ERRONEOUSLY ANALYZED APPELLANTS' CLAIM OF NEGLIGENCE *PER SE,* IMPROPERLY APPLIED THE ECONOMIC LOSS DOCTRINE TO APPELLANTS' CLAIM OF NEGLIGENCE *PER SE* AND IMPROPERLY CONCLUDED THAT "LICENSING" STATUTES CANNOT SERVE AS THE BASIS FOR A CLAIM OF NEGLIGENCE *PER SE*.

Missouri Revised Statutes sections 339.710-339.860

*Johnson v. Kraft General Foods, Inc.,*885 S.W.2d 334, 336 (Mo. 1994) (en banc)

Imperial Premium Finance, Inc. v. Northland Ins. Co., 861 S.W.2d 596, 599 (Mo. Ct. App. 1993)

Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 714 S.W.2d 919, 922 (Mo. Ct. App. 1986)

III. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BASED UPON THEIR HOLDING THAT MISSOURI LAW DOES NOT RECOGNIZE A CLAIM FOR NEGLIGENT OMISSION BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENT OMISSION WHERE THEY PROPERLY SUBMITTED AND THE JURY FOUND ALL OF THE NECESSARY ELEMENTS OF A CLAIM FOR NEGLIGENT OMISSION AGAINST THE GUNDAKER RESPONDENTS IN THAT MISSOURI LAW DOES RECOGNIZE A CLAIM FOR NEGLIGENT OMISSION.

Missouri Revised Statutes sections 339.710-339.860

Kesselring v. St. Louis Group, Inc., 74 S.W.3d 809, 815-816 (Mo. Ct. App. 2002)

Seidel v. Gordon A. Gundaker Real Estate Co., 904 S.W.2d 357 (Mo. Ct. App. 1995)

Dobbins v. Kramer, 780 S.W.2d 717, 719 (Mo. Ct. App. 1989)

IV. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES FOR ALL RESPONDENTS BECAUSE THE JURY'S AWARD OF $140,000 IN COMPENSATORY DAMAGES IS SUPPORTED BY A REASONABLY RATIONAL BASIS IN THAT IF APPELLANTS ARE LIMITED TO THE RECOVERY OF DAMAGES FOR THE FAILURE TO DAMP-PROOF THE EXTERIOR OF THE FOUNDATION, THE DAMAGES SUSTAINED BY APPELLANTS FOR THE DAMP-PROOFING ALONE WAS $141,579.

Parker v. Pine, 617 S.W.2d 536, 541 (Mo. Ct. App. 1981)

Manning v. ABC Exterminators, Inc., 682 S.W.2d 3, 7-8 (Mo. Ct. App. 1984)

**V. THE TRIAL COURT AND APPELLATE COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES FOR ALL RESPONDENTS BECAUSE THE JURY WAS ENTITLED TO AWARD APPELLANTS DAMAGES FOR MORE THAN JUST THE FAILURE TO DAMP-PROOF THE EXTERIOR OF THE FOUNDATION IN THAT THE VESCOVO RESPONDENTS ACCEPTED RESPONSIBILITY FOR TWO ADDITIONAL CODE VIOLATIONS IN THE HOME AND THE SLOPING PORCH FOR A TOTAL OF $82,250 IN COSTS TO REPAIR RESULTING IN A DIFFERENCE IN VALUE OF $177,800 AND THE GUNDAKER RESPONDENTS WHO WERE JOINTLY AND SEVERALLY LIABLE WITH THE VESCOVO RESPONDENTS DID NOT OBJECT TO THESE CONCESSIONS AT THE TIME THEY WERE MADE TO THE JURY. **

Rogers v. Thompson, 265 S.W.2d 282, 287 (Mo. Banc 1954)

Krenski v. Aubuchon, 841 S.W.2d 721, 728 (Mo. Ct. App. 1992), *overruled on other grounds.*

ARGUMENT

Standard of Review

The trial court ruled that the Gundaker Respondents were entitled to a new trial based upon the erroneous submission of a verdict directing instruction for negligence *per se*. App. at 5-6. Questions of instructional error are questions of law. *See, e.g., Lashmet v. McQueary*, 954 S.W.2d 546, 549 (Mo. Ct. App. 1997). The trial court's granting of a new trial is only to be given deference if it involves a question of fact. *Id.* Where the granting of a new trial is based upon a question of law, however, the trial court is not presumptively correct and the ruling is not to be reviewed for an abuse of discretion. *Id.* Rather, the appellate court must review the issue of law upon a complete examination of the record. *Id.*

The trial court also granted all Respondents a new trial as to damages based upon an alleged instructional error. Thus, this is an issue of law that this Court must determine upon a complete examination of the record. In any event, where judgment was entered after a jury's verdict in favor of Appellants, appellants are "entitled to have the evidence and all reasonable inferences deducible therefrom viewed in the light most favorable" to the jury's verdict. *Bodimer*, 978 S.W.2d at 8.

I. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENCE *PER SE* FOR VIOLATIONS OF MISSOURI REVISED STATUTES SECTIONS 339.710-339.860 IN THAT THE PLAIN

LANGUAGE OF THE STATUTES DEMONSTRATE AN INTENT BY THE LEGISLATURE TO HOLD THE GUNDAKER RESPONDENTS LIABLE FOR VIOLATIONS OF THE STATUTES, APPELLANTS ARE WITHIN THE CLASS OF PERSONS THAT THE STATUTES WERE DESIGNED TO PROTECT AND THE HARM COMPLAINED OF IS THE TYPE OF HARM THAT THE STATUTES WERE INTENDED TO PREVENT, THE STATUTES CONTAIN NO OTHER MEANS OF ENFORCEMENT AND A NEGLIGENCE *PER SE* ACTION WOULD FURTHER THE PURPOSES OF THE LEGISLATION AND ENSURE ITS EFFECTIVENESS.

In 1997, the Legislature enacted Missouri Revised Statutes sections 339.710-339.860. Section 339.730.3 requires that a real estate licensee disclose all adverse, material facts "actually known or that should have been known by the licensee" to a potential purchaser of the property. In addition, section 339.730.2 requires the licensee to comply with the requirements of all of the new provisions including section 339.810. Section 339.810 holds that licensees are not liable for misrepresentations of their client except when they "knew or should have known of the misrepresentation."

When deciding whether these statutes can serve as the basis of a claim for negligence *per se*, Missouri courts have followed a particular analysis that includes several steps. *See Johnson v. Kraft General Foods, Inc.,* 885 S.W.2d 334, 335 (Mo. 1994) (en banc); *Imperial Premium Finance, Inc. v. Northland Ins. Co.,* 861 S.W.2d 596, 599 (Mo. Ct. App. 1993). The goal of this analysis is to determine whether the Legislature intended to impose liability for a violation of the statutes. *Johnson,* 885

S.W.2d at 335. First, the Court considers the plain language of the statutes and the circumstances surrounding their enactment. *Id.* Second, the Court considers whether the statutes were intended to (a) protect a particular class of persons; (b) protect a particular interest of that person; (c) protect the interest against the harm that has resulted; and (d) protect the interest against the particular hazard from which the harm resulted. *See* Restatement of the Law of Torts (Second) § 286 and *Johnson,* 885 S.W.2d at 336-337. Third, the court considers whether the Legislature included an exclusive means of enforcing the statute. *See Shqeir v. Equifax, Inc.*, 636 S.W.2d 944, 948 (Mo. 1982) (en banc). Finally, the Court determines as a matter of public policy whether an action for negligence *per se* for violation of the statute would further the purpose of the legislation and assure the effectiveness of its provisions. *See Johnson,* 885 S.W.2d at 336-37; *see also Imperial Premium Finance,* 861 S.W.2d 596. The statutes at issue here meet all of these criteria and therefore, should be construed to provide a standard of conduct whose violation constitutes negligence *per se.*

The plain language of these statutes imposes a duty upon real estate licensees, like the Gundaker Respondents, to disclose all adverse, material facts that they knew or should have known. This duty runs to the other parties to the transaction to whom the information disclosed would be material. In both sections 339.730 and 339.810, the Legislature set forth this requirement, and in 339.810 the Legislature stated that failure to comply with this requirement would subject a licensee to liability for misrepresentation. Thus, section 339.810 speaks in terms of *liability* for breach of the duty to disclose. This

is clear evidence of legislative intent to impose liability upon a real estate licensee for breach of the duty of disclosure.

The Legislature provided some insight into the purpose of enacting these statutes in section 339.840 in which the Legislature stated that these provisions were intended to "supercede the common law of agency with respect to whom the fiduciary duties of an agent are owed in a real estate transaction." Thus, it is clear from this language that the Legislature intended to impose a duty upon the Gundaker Respondents that may or may not have existed at common law. Section 339.840 continues with the statement that these provisions "shall not be construed to limit civil actions for negligence, fraud, misrepresentation or breach of contract." By this statement, it is clear that the Legislature intended to preserve all actions against real estate agents and brokers who breached their statutory duties.

The Legislature specifically preserved Appellants' right to bring a negligence action. Negligence *per se* is nothing more than negligence as a matter of law. *See Monteer v. Prospectors Lounge, Inc.*, 821 S.W.2d 898, 900 (Mo. Ct. App. 1992). In a negligence *per se* action, the element of negligence is presumed and only a violation of the statute is required. *See Jensen v. Feely*, 691 S.W.2d 926, 927, n.1 (Mo. Ct. App. 1985). Thus, where the Legislature specifically preserved actions for negligence, it, likewise, preserved an action for negligence *per se* because common law claims for negligence and negligence *per se* are not mutually exclusive, but different ways of establishing the same claim. *See, e.g. King v. Morgan*, 873 S.W.2d 272 (Mo. Ct. App. 1994) (plaintiff entitled to sue for both negligence and negligence *per se* for the same

injuries). Adopting the appellate court's position would eliminate claims for negligence *per se* from Missouri's jurisprudence because any claim for negligence *per se* has the same elements as a claim for negligence except that negligence is established by showing a violation of the statute in a negligence *per se* action.

The appellate court erroneously reads this provision to mean that the Legislature intended to "limit" Appellants to common law claims because this provision indicates that the statutes do not supercede the common law. It is clear from this argument that the appellate court misapprehended Appellants' claim. An action for negligence *per se* is nothing more than an action for ordinary negligence, except that a statute sets forth a duty, the violation of which establishes negligence as a matter of law. *See Monteer,* 821 S.W.2d at 900. Missouri courts have consistently held that a statutorily-imposed standard of conduct, like the statutes at issue, do not "supersede and displace remedies otherwise available at common law" unless "the statutory remedy fully comprehends and envelopes the remedies provided by common law." *See Detling v. Edelbrock,* 671 S.W.2d 265, 271-72 (Mo. 1984) (en banc). From this it is clear that in section 339.840 the Legislature was merely settling any question that might arise as to whether the statutes were intended to displace common law remedies against a broker or agent. The Legislature's statement that "negligence" claims were not to be limited is even more compelling evidence that the Legislature intended that the statute could serve as the basis for a claim of negligence *per se* action.

Inexplicably, the traditional analysis applied by Missouri courts to determine whether a statute can serve as the basis of a negligence *per se* action is completely absent

from the appellate court's opinion. Before a court can decide whether the Legislature intended to impose liability for violation of a statutorily-imposed standard of conduct, the court must always consider whether the plaintiff is within the class of persons intended to be protected and whether the harm sustained is the type of harm the statute was intended to prevent. *See* Restatement of the Law of Torts (Second) § 286 and *Johnson*, 885 S.W.2d at 336-337. This analysis was not done by the Court of Appeals.

In this case, it can hardly be argued that Appellants are not within the class of persons that sections 339.710-339.860 were designed to protect. Clearly, section 339.730 and 339.810 are intended to require full disclosure in a real estate transaction. As the purchasers of real property, appellants were in the class of persons that was intended to be protected by the disclosure. The interest the Legislature intended to protect is the financial interest of the buyer who may pay more for property than it is actually worth because of the undisclosed defects. The harm that resulted to Appellants is exactly the kind of harm the statutes were intended to prevent: paying too much for a house that had undisclosed defects. Finally, this Legislation was clearly intended to require full disclosure of adverse, material facts known by the realtor or that should have been known to prevent the very harm that occurred in this case. Sections 339.730 and 339.810 clearly satisfy the traditional requirements of a statute that forms the basis of a negligence *per se* action.

Although not conclusive, even after the traditional analysis indicates that plaintiffs are within the class of persons the statute was intended to protect and the harm was the type of harm that the statute was intended to prevent, the courts also may consider

whether there is another means of enforcing the statute. *See Johnson,* 885 S.W.2d at 336-337. This analysis in this case provides strong evidence that the Legislature intended to allow a cause of action for negligence *per se* for violation of these provisions because there is a complete absence of any provision for enforcement of sections 339.730 and 339.810.

In the past, each time the Legislature added sections to Chapter 339, it enacted a statute authorizing the Missouri Real Estate Commission to enforce the newly added sections. For example, in section 339.120 the Legislature authorized the Missouri Real Estate Commission to enforce "the provisions of sections 339.010 to 339.180" and in section 339.606 the Legislature authorized the Missouri Real Estate Commission to carry out "the provisions of sections 339.600 to 339.610." There is no comparable provision for sections 339.710-339.860. It is well-established law that an administrative agency has no greater authority than that granted by the Legislature. *See Farmer v. Barlow Truck Lines, Inc.,* 979 S.W.2d 169 (Mo. 1998). Accordingly, without statutory authority to enforce these provisions, the Missouri Real Estate Commission cannot do so. This means the Legislature provided no means of enforcing these provisions other than through claims for negligence *per se.*[3]

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[3] Even if a statute contains other means of enforcement, Missouri courts will allow the statute to serve as a basis for negligence *per se* if the other means of enforcement provide no remedy to the aggrieved party. *See e.g., Jensen,* 691 S.W.2d at 929 (ordinance requiring dogs to be leashed supported negligence *per se*

There is further evidence that this Legislation was intended to establish a claim for negligence *per se* that cannot be ignored by this Court. First, if Appellants were limited to their common law claims as the appellate court suggests or even an administrative action by the Missouri Real Estate Commission to redress these wrongs, these statutory provisions would serve no purpose whatsoever. That is because Appellants' common law claims as well as the Missouri Real Estate Commission's right to bring an administrative action against a realtor guilty of a misrepresentation were in existence long before the enactment of these provisions. *See Seidel v. Gordon A. Gundaker Real Estate Co.,* 904 S.W.2d 357 (Mo. Ct. App. 1995) and § 339.100.2(2). As this Court has recognized, holding that a statute serves no purpose is contrary to the most basic tenets of statutory construction:

> It is well-established, however, that the presumption is that the legislature did not intend for any part of a statute to be without meaning or effect. It is not presumed to have intended a useless act. The presumption is that it intended its act to have applicability and effect.

Stiffelman v. Abrams, 655 S.W.2d 522, 531 (Mo. 1983) (en banc). Thus, this Court must give this statute meaning and effect as written.

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claim even where statute included criminal and civil penalties for its violation) and *King,* 873 S.W.2d at 278 (statute limiting width of vehicles on highway supported claim for negligence *per se* even though statute provided for criminal penalties and regulations to enforce statute imposed civil penalties).

The public policy considerations in allowing Appellants to enforce the statutorily imposed duties are even more compelling. Imposing liability here for violation of the statutes would no doubt further the purpose of the Legislation and assure the effectiveness of its provisions. Clearly, the legislative purpose in enacting sections 339.730 and 339.810 was to require full disclosure by real estate agents, thereby protecting parties to a real estate transaction from misrepresentations in the sale of a home. A cause of action for negligence *per se* for failing to make full disclosure, therefore, furthers the purpose of the legislation. It also ensures the effectiveness of the statute by subjecting the real estate agent to liability for failing to make full disclosure and providing an enforcement mechanism for these statutes. As a practical matter, there is no harm in disclosure even if there is some question as to validity of the information. If the agent makes the disclosure, the purchaser has the opportunity to do its own investigation to determine the validity of the information. Where the information is incorrect, it is of no consequence. Where the information is accurate, the purchaser can take this into account in determining the value of the property and whether they want to purchase the property. This is what the Legislature intended to promote—full disclosure in a real estate transaction. A claim for negligence *per se* accomplishes this purpose.

Moreover, the recent trend in Missouri law is to expand liability for misrepresentations rather than restrict it. In *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809, 815-816 (Mo. Ct. App. 2002), the appellate court refused to enforce a contractual provision between a seller and a broker in a commercial context that would have absolved a broker from liability for failing to disclose material information. The

appellate court recognized that it is within broker's interest to have the property sell at the highest possible price and therefore, the broker and the seller benefit from the broker's withholding of information that would tend to diminish the value of the property. *Id.* And, that a broker benefits from his appearance as trustworthy and knowledgeable in the transaction. *Id.* Thus, the court held that as a matter of public policy enforcement of this provision immunizing a broker from liability for negligent or intentional omissions would encourage the broker to conceal damaging information from buyers with no risk of suit. *Id. See generally Keefhaver v. Kimbrell*, 58 S.W.3d 54, 60 (Mo. Ct. App. 2001) (court recognized that "modern trend is not to extend but to restrict the rule requiring diligence in persons to whom representations are made, and to condemn the falsehood of the person making the representation, rather than the credulity of the victim.")

In sum, the statutes at issue in this case demonstrate an intent by the legislature to enforce its provisions through an action for negligence *per se.* This conclusion is supported by Missouri's public policy of expanding liability for misrepresentations in a real estate transaction. Appellants established the elements of negligence *per se* at the trial. Where the jury found the operative facts in Appellants' favor, Appellants were entitled to recover on their claim of negligence *per se*. The trial court improperly granted a new trial to the Gundaker Respondents because the Legislature set forth a standard of conduct that the Gundaker Respondents were obligated to follow. Where their conduct fell below this statutorily-established standard, they should be held accountable through a negligence *per se* action to give effect to the legislative enactments. The ruling of the trial court should be reversed and the jury verdict should be reinstated.

II. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENCE *PER SE* FOR VIOLATIONS OF MISSOURI REVISED STATUTES SECTIONS 339.710-339.860 IN THAT THE LOWER COURTS ERRONEOUSLY ANALYZED APPELLANTS' CLAIM OF NEGLIGENCE *PER SE*, IMPROPERLY APPLIED THE ECONOMIC LOSS DOCTRINE TO APPELLANTS' CLAIM OF NEGLIGENCE *PER SE* AND IMPROPERLY CONCLUDED THAT "LICENSING" STATUTES CANNOT SERVE AS THE BASIS FOR A CLAIM OF NEGLIGENCE *PER SE*.

Neither the trial court nor the appellate court followed the analysis adopted by this Court to determine whether a violation of this statute should qualify as negligence *per se*. The appellate court's opinion that these statutes do not support a claim for negligence *per se* is erroneous in several respects. First, the appellate court provided no analysis of the relevant factors in determining whether violation of this particular statute qualifies as negligence *per se*. *See, e.g., Johnson,* 885 S.W.2d at 335-36, in which this Court set forth the appropriate analysis and *Imperial Premium Finance,* 861 S.W.2d at 596, 599, in which the appellate court applied the analysis to another statute. Most importantly, is the absence of any explanation by the appellate court as to the purpose of this legislation. As set forth in *Johnson* and *Imperial Premium,* one of the most important considerations for the court is the purpose of the legislation and whether a negligence *per se* action would

further the purpose of the legislation. Here, the appellate court did not consider what the legislature might have been trying to accomplish by enacting these statutes, which as set forth above is the analysis that is required. Instead, the appellate court cited to a 1939 New York case with inapposite facts and relied upon factors that have never been part of the analysis as to whether a statute can support a claim of negligence *per se.*

The appellate court relied upon language included in a 1939 New York case to conclude that negligence *per se* was not appropriate in this case. *See* Court of Appeals opinion, p. 18. In *Tedla v. Ellman,* 19 N.E.2d 987, 990-91 (N.Y. 1939), the issue before the court was not whether to impose liability against a party for violation of a statute, but rather whether to preclude recovery by a party because that party violated a statute. Plaintiffs were injured while they were walking along the wrong side of the road when a car struck them. *Id.* at 990-91. Defendant argued that plaintiffs should be precluded from recovery under the contributory negligence rule because, as a matter of law, they were walking on the wrong side of the road. *Id.* Not only did the Court believe that the defendant was entirely at fault for the accident, but there was also testimony that the other side of the road was very crowded and thus, plaintiffs had acted reasonably by deciding to walk on the other side of the road. *Id.* Thus, the court was loathe to preclude their recovery from defendant when they had an excuse for violating the statute at issue. *Id.* The court in *Tedla* was concerned with strictly enforcing a statute without consideration of an excuse for violation, not whether the statute should support a claim for negligence *per se.* The issue before the New York court, therefore, was very different than the issue in this case and its analysis simply does not apply. It certainly should not take

precedence over a Missouri court's analysis of whether a statute can support a claim for negligence *per se.*

Without citing to any precedent in Missouri or otherwise, the appellate court also held that a statute that protects economic interests only cannot be the basis of a negligence *per se* action. *See* Opinion of Appellate Court, p. 16. In effect, the court applied the economic loss doctrine to all claims for negligent misrepresentation. Not only is this contrary to Missouri law, it is illogical.

Missouri's economic loss doctrine arises in the context of a contractual relationship. This doctrine simply holds that a plaintiff cannot recover under tort theories for purely economic losses arising out of a contractual relationship. *See, e.g. Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.,* 714 S.W.2d 919, 922 (Mo. Ct. App. 1986). It serves to limit a party to his contractual claims such as breach of warranty when his loss is limited to economic harm because the duties owed to each other arose out of the contractual relationship between the parties. *Id.* In essence, this doctrine precludes an action for negligent performance of a contract. Clearly, the relationship between the Gundaker Respondents and Appellants did not arise out of a contractual relationship and thus, this doctrine does not even apply by its terms.

Moreover, application of the economic loss doctrine to a claim premised upon negligent misrepresentation would eliminate claims of negligent misrepresentation altogether. Misrepresentation is defined as a tort aimed at redressing *economic harm* that occurs as a result of false or misleading statements. *See* The Law of Torts, Dan B. Dobbs, (2001), § 469, p. 1344. Thus, applying the economic loss rule to a claim that is

intended to redress economic loss would make no sense because a claim for common law negligent misrepresentation is no different than a claim for negligence *per se*, except that in a negligence *per se* action, the violation of a statute serves as the finding of negligence. *See generally Monteer*, 821 S.W.2d at 899 (action for negligence differs from negligence *per se* only in respect that violation of statute is substituted for finding of negligence in a *per se* action).

Finally, application of the economic loss doctrine to claims of negligence *per se* is contrary to existing Missouri precedent. In *Imperial Premium Finance*, 861 S.W.2d at 599, plaintiff sought to redress its economic loss caused by the failure of an insurance company to remit unearned premiums through an action for negligence *per se.* The court in *Imperial Premium Finance* did not hold that economic losses could not be recovered in such an action, but rather the court applied the traditional analysis applied by Missouri courts when it considered whether the statute could serve as the basis of a negligence *per se* action: whether plaintiff was within the class of persons that the statute was designed to protect and whether it was intended to prevent the type of harm sustained. Likewise, in *Johnson*, 885 S.W.2d at 335, the plaintiff sought to recover economic damages resulting from his improper termination. This Court determined that plaintiff could not assert a claim for negligence *per se* under the applicable statute but only after analyzing whether plaintiff was within the class of persons the statute was designed to protect and whether the statute included other means of enforcement. At no point in time did this Court evaluate the claim based upon the type of damages sought. *See also Gipson v. Slagle*, 820 S.W.2d 595 (Mo. Ct. App. 1991) (plaintiff sought recovery of economic

damages for violation of a statute). Thus, it is clear that the type of damages sustained by the plaintiff has never been a factor in determining whether a statute supports a claim of negligence *per se.* [4]

In addition, the Gundaker Respondents argued and the appellate court adopted the erroneous position that sections 339.730 and 339.810 are merely "licensing statutes" that cannot serve the as the basis for a negligence *per se* action. While Appellants strongly question whether the statutes at issue can be characterized as "licensing statutes" where these statutes do not relate to the licensure of an agent or broker and the Missouri Real Estate Commission has no authority to enforce these provisions, this argument is unsupported by the case law. Not one of the cases cited by the Gundaker Respondents or the appellate court holds that a licensing statute cannot be applied in a negligence *per se* action. In fact, in all of these cases the courts properly analyze the negligence *per se* issue by determining whether the statute was intended to protect a particular class of persons and whether the harm complained of is the type the statute was intended to prevent.

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[4] Although it was never a consideration in these three cases, they involved claims against a party with whom the plaintiff had a contractual relationship. If the Court was inclined to apply the economic loss doctrine to bar claims for negligence *per se* in those contexts, it would be more logical than applying the economic loss doctrine to Appellants in this instance who have no contractual relationship with the Gundaker Respondents.

For example, in *Gipson v. Slagle,* 820 S.W.2d 595, 597 (Mo. Ct. App. 1991) the court found that the Gipsons were not within the class of persons the statute was designed to protect and therefore a claim of negligence *per se* did not apply. Similarly, in *Business Men's Assurance Co. of America v. Graham,* 891 S.W.2d 438, 456 (Mo. Ct. App. 1994), the court held that the plaintiff did not establish that the injury complained of was of the nature that the statute was designed to prevent. In *Imperial Premium Finance, Inc.*, 861 S.W.2d 438, 455, the court found that the statute at issue was not intended to protect the party who was trying to use it and therefore, allowing the statute to serve as the basis for an action for negligence *per se* would not further the purposes of the legislation.

Finally, in *American Mortgage Investment Co. v. Hardin-Stockton Corp.,* 671 S.W.2d 283 (Mo. Ct. App. 1984), the court found that the evidence adduced did not support the submission of a claim for negligence *per se.* The statute at issue required a broker to remit funds owed to other parties following the closing of a real estate transaction. In this case, the closing was handled by the lender for the buyers, who failed to remit payment. When the seller could not recover the funds from the lender, it sued the broker. Because there was serious question as to whether the statute even applied to the facts at hand where the broker had not been responsible for the closing, the court found that there was insufficient evidence to submit a claim for negligence *per se* for an alleged violation of the statute. The court reasoned that the statute was not designed to protect the seller in the situation presented by the facts. Thus, the court did not hold or even imply that Chapter 339 would not support a claim of negligence *per se.* In fact, the opposite conclusion is true. The court simply found that the plaintiff had failed to make a

submissible case under the evidence presented because it could not show a violation of the statute or that it applied to the situation presented.

Thus, these cases do not stand for the proposition that "licensing" statutes cannot serve as the basis of a negligence *per se* action. The statutes in each case simply did not qualify under the negligence *per se* analysis established by Missouri courts. At a minimum, these statutes show that there is no reason to depart from Missouri precedent to analyze these issues. If the appellate court had simply applied the analysis traditionally followed by Missouri courts, it would have found that the statutes at issue in this case, unlike the statutes in those other cases, do protect a particular class of persons from a particular type of harm. The facts of this case demonstrate that the Appellants fit squarely within the class of persons intended to be protected and they suffered the type of harm that the statutes were designed to prevent. Thus, this Court should reinstate the jury's verdict for negligence *per se* against the Gundaker Respondents.

III. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL TO THE GUNDAKER RESPONDENTS BASED UPON THEIR HOLDING THAT MISSOURI LAW DOES NOT RECOGNIZE A CLAIM FOR NEGLIGENT OMISSION BECAUSE APPELLANTS WERE ENTITLED TO RECOVER ON A CLAIM OF NEGLIGENT OMISSION WHERE THEY PROPERLY SUBMITTED AND THE JURY FOUND ALL OF THE NECESSARY ELEMENTS OF A CLAIM FOR NEGLIGENT OMISSION AGAINST THE GUNDAKER

RESPONDENTS IN THAT MISSOURI LAW DOES RECOGNIZE A CLAIM FOR NEGLIGENT OMISSION.

After finding that plaintiffs could not proceed under a negligence *per se* theory, the appellate court examined the verdict-directing instructions against the Gundaker Respondents to determine whether they set out the elements of any viable causes of action. The court found that "[t]he instructions [did] not contain the required elements of fraudulent misrepresentation, fraudulent omission, or negligent misrepresentation." 6/18/02 Appellate Opinion at 18. As outlined below, the instruction against the Gundaker Respondents set forth the elements of negligent omission. However, the appellate court refused to reinstate the jury's verdict on this basis because it found that there was no authority establishing a cause of action for negligent omission. *Id.*

The appellate court erred because there is authority establishing a cause of action for negligent omission. The cause of action is recognized by Missouri courts, the Restatement (Second) of Torts and by a number of other states. Recently, in *Kesselring*, the same appellate court reversed summary judgment in favor of a realtor representing sellers of commercial property because the appellate court found that the buyers stated a claim against the realtors for negligent omission. 74 S.W.3d at 813-16.[5] Much like this case, the buyers in *Kesselring* were purchasers of real estate who were not given material

[5] The plaintiffs in *Kesselring* did not proceed against the realtors under a negligence *per se* theory under Mo. Rev. Stat. §§ 339.730 or 339.810, which apply only to residential real estate transactions.

information within the possession of the sellers and the sellers' brokers. *Id.* at 813. The buyers brought claims against the brokers for negligent misrepresentation for failing to disclose the material information. *Id.* Citing section 551 of the Restatement (Second) of Torts, the court held that there was a cause of action for negligent misrepresentation based upon the failure to disclose information. *Id.* at 814.

The court found that five different circumstances listed in the Restatement gave rise to a duty to disclose information. *Id.* One is directly on point here. The Restatement provides that in a business transaction such as the one at issue, a defendant has a duty to exercise reasonable care to disclose information when the defendant knows facts basic to the transaction, knows that the plaintiff is about to enter into the transaction under a mistake as to them, and the plaintiff, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts. *Id.* These elements are consistent with existing Missouri statutes and case law.

The common law cause of action for negligent omission in *Kesselring* and the Restatement track the provisions of Missouri Revised Statute sections 339.730 and 339.810. Both claims impose liability against brokers and agents in a residential real estate transaction who know or should know of adverse facts material to the buyer for failing to disclose the material facts known or that should be known. *See* Mo. Rev. Stat. §§ 339.730, 339.810 and *Kesselring*, 74 S.W.3d at 814 and the Restatement (Second) of Torts § 551 (1977). All of these elements were submitted to the jury by Appellants' verdict director against the Gundaker Respondents, which required the jury to find that

the Gundaker Respondents knew or should have known that the exterior of the foundation of the home had not been damp-proofed; and that this information would have been material to Appellants' purchase of the home; and that the Gundaker Respondents failed to disclose this information to Appellants; and that, as a direct result of such conduct, Appellants were damaged. L.F. at 308-310.

In addition to this legislation, a claim for negligent omission is supported by Missouri case law holding that one is under a duty to speak if he has superior knowledge not within the fair and reasonable reach of the other party. *See*, *e.g.*, *Seidel*, 904 S.W.2d at 361. Moreover, even before the opinion in *Kesselring*, the court in *Dobbins v. Kramer*, 780 S.W.2d 717, 719 (Mo. Ct. App. 1989), implies that there is a viable cause of action for negligent omission where it states that the jury instruction at issue might have submitted a claim for negligent omission, but not fraudulent omission because it was missing the element of intent. Additionally, courts in many other states have held that negligent misrepresentation by omission is a viable cause of action.[6]

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[6] *See Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199, 1202 (Alaska 1998) (court allowed claim of "negligent misrepresentation by omission."); *Lombardo v. Albu*, 14 P.3d 288, 289-290 (Ariz. 2000) (plaintiff filed an action alleging "negligent misrepresentation"; applying § 551 to negligent misrepresentation, the court held that a home "seller has a duty to disclose to the buyer the existence of termite damage whenever it materially affects the value of the property."); *Butcher v. Truck Ins. Exch.*, 77 Cal. App. 4th 1442, 1464-65, 92

Cal. Rptr. 2d 521, 537-38 (Cal. Ct. App. 2000) (plaintiff filed an action for "negligent misrepresentation"; applying § 551, the court held that failure to disclose information presents a triable issue of negligent misrepresentation); *Bair v. Pub. Serv. Employees Credit Union*, 709 P.2d 961, 961-62 (Colo. Ct. App. 1985) (plaintiff alleged defendant was negligent in violating defendant's "duty to disclose"; applying § 551, the court held that plaintiff presented a triable issue); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996) (plaintiff filed an action alleging "equitable fraud"; the court stated that equitable fraud "provides a remedy for negligent or innocent misrepresentations" and can be met by a negligent "misstatement or omission"); *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1207 (D.C. 1999) (jury instruction stated that "to prove his claim for negligent misrepresentation, [plaintiff] must show: (1) that [plaintiff]…omitted a fact that he had a duty to disclose…."); *Paul v. Destito*, 550 S.E.2d 739, 744-45 (Ga. Ct. App. 2001) (court collectively dismissed fraud and negligent misrepresentation claims that alleged failure to disclose information, stating that the "same principles apply to both fraud and negligent misrepresentation"); *Shambaugh v. Lindsay*, 445 N.E.2d 124, 125 n.3 (Ind. Ct. App. 1983) (court stated that § 551 "is entitled 'Liability for Non-disclosure' and basically sets forth the consequences of engaging in either negligent or intentional misrepresentation." (emphasis added)); *Soc'y of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 742 (5th Cir. 1997) (court held that under

Louisiana law, negligent misrepresentation "applies in both nondisclosure and misinformation cases."); *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996) (court held that silence constitutes negligent misrepresentation where there is a breach of duty); *Townsends, Inc. v. Beaupre*, 716 N.E.2d 160, 165 (Mass. Ct. App. 1999) (applying § 551, the court held that to prove misrepresentation by omission, the plaintiff "was required to prove that [the defendant] knowingly, recklessly, or at least negligently failed to include the information required by the accounting standards." (emphasis added)); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992) (court stated that an omission is actionable as negligent misrepresentation if duty to disclose exists); *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So. 2d 1120, 1124 (Miss. 2002) ("In order to establish…negligent misrepresentation, a plaintiff is required to show: (1) a misrepresentation or omission of a fact…."); *Ingaharro v. Blanchette*, 440 A.2d 445, 447 (N.H. 1982) (court held that mere silence constitutes negligent misrepresentation where there is a duty to disclose); *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 766 P.2d 928, 932 (N.M. Ct. App. 1988) (plaintiff filed an action alleging "negligent misrepresentation"; the court held that the claim was valid, stating that failure to disclose is often alleged as a ground for claims of negligent misrepresentation); *Abbott v. Herzfeld & Rubin, P.C.*, 609 N.Y.S.2d 230, 231-32 (N.Y. App. Div. 1994) (court held that plaintiff stated a cause of action for "negligent misrepresentation [] based on omissions"); *Cerberus Partners, L.P. v. Gadsby &*

Finally, Missouri law has long recognized that the breach of duty comprising negligence arises out of an act *or omission* that causes injury. *See, e.g., Millard v. Corrado,* 14 S.W.3d 42, 47 (Mo. Ct. App. 1999). In addition, Missouri has long recognized viable causes of action for both negligent and fraudulent misrepresentation, and fraudulent omission. *See, e.g., Sofka v. Thal,* 662 S.W.2d 502, 506 (Mo. Banc 1983); *Chubb Group of Ins. v. C.F. Murphy,* 656 S.W.2d 766, 783-84 (citing Restatement (Second) of Torts § 552 (1977); *Seidel,* 904 S.W.2d at 361. Just like an affirmative misrepresentation can be made negligently or fraudulently, it is only logical that a failure to disclose can be done negligently or fraudulently.

Finding a viable cause of action for negligent misrepresentation by omission in the context of a residential real estate transaction does nothing more than recognize the well-established principle of Missouri tort law that an act or omission can constitute

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Hannah, 728 A.2d 1057, 1061 (R.I. 1999) (court allowed plaintiff to proceed on claims of "negligent misrepresentation and negligent omission"); *Vanderpool v. Grange Ins. Ass'n,* 756 P.2d 111, 112 (Wash. 1988) (court upheld trial court's decision "on the theory of 'negligent misrepresentation by omission'"); *D'huyvetter v. A.O. Smith Harvestore Prods*., 475 N.W.2d 587, 596-97 (Wis. Ct. App. 1991) (plaintiff filed an action alleging "negligent misrepresentation"; the court held that in the negligent misrepresentation context, "[a] defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone." (emphasis added)).

negligence. It is also in accord with public policy, which favors disclosure to an unknowing buyer of residential real estate. It would be ironic indeed if buyers of commercial real estate such as those in *Kesselring*, who are presumably savvy and have access to financial statements and other information about the property beyond the mere residential inspection, could recover for negligent omission against the sellers' broker, but a buyer of residential property such as Appellants could not.

Finally, the Court's reinstatement of the jury's verdict of liability against the Gundaker Respondents would maintain consistency within the case itself because the appellate court affirmed the liability of the Vescovo Respondents, whom the jury found liable for the same negligent omission. *See* 6/18/00 Appellate Opinion at 19 (new trial as to liability of Gundaker Respondents only); L.F. at 305-307 (negligent omission verdict directors against Vescovo Respondents). For all of these reasons, the Court should reinstate the jury's verdict of liability against the Gundaker Respondents.

IV. THE TRIAL COURT AND THE APPELLATE COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES FOR ALL RESPONDENTS BECAUSE THE JURY'S AWARD OF $140,000 IN COMPENSATORY DAMAGES IS SUPPORTED BY A REASONABLY RATIONAL BASIS IN THAT IF APPELLANTS ARE LIMITED TO THE RECOVERY OF DAMAGES FOR THE FAILURE TO DAMP-PROOF THE EXTERIOR OF THE FOUNDATION, THE DAMAGES SUSTAINED BY APPELLANTS FOR THE DAMP-PROOFING ALONE WAS $141,579.

The amount of damages awarded is a matter resting within the sound discretion of the jury. *See Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509, 516 (Mo. Ct. App. 1998). If the damages awarded to a successful party are "founded on any reasonably rational basis, it will be upheld as responsive to the evidence." *See Parker v. Pine*, 617 S.W.2d 536, 541 (Mo. Ct. App. 1981). That is because the assessment of damages is primarily a function of the jury. *See Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo. 1998) (en banc).

The jury awarded Appellants damages under MAI 4.03, which instructed them to award the difference between the value of the house as represented and the actual value of the house on the date of sale. The appellate court found that 4.03 was the proper damages instruction (and the Respondents agree). Court of Appeals opinion at p. 12. The appellate court opined that 4.03, although the proper instruction, was prejudicial to Respondents as it was submitted unmodified, because the jury awarded Appellants damages for more than just the lack of damp-proofing under the appellate court's

calculation of damages. Court of Appeals opinion at p. 13. The appellate court found that the damages representing the diminution in value based on the lack of damp-proofing could not have exceeded $35,520. *Id.* It is clear that the appellate court misinterpreted the expert testimony when it came to this conclusion. As set forth below, the calculation of difference in value based on the damp-proofing alone is $141,579 based on undisputed evidence at trial. Thus, the jury's award of $140,000 is, to say the least, founded on a "reasonably rational basis," and should be reinstated.

At trial, Appellants claimed $220,000 in actual damages. This amount represented the diminution in value based on all of the defects in the home. But, the jury only awarded $140,000 in response to the verdict director identifying the failure to damp proof as the defect that should have been disclosed. This was by far the most expensive defect to be corrected and it was a code violation. Matt Foreman, who was knowledgeable about construction and costs of repair and who was the only expert at trial to opine on the cost to repair the damp-proofing, testified that labor and materials needed to repair the damp-proofing defect was $27,800. Tr., 9/27/00 at 43-44, 84-94; L.F. Exh. 147. This amount was needed for labor and materials to excavate the existing foundation, clean the concrete, apply the foundation waterproofing material and reinstall the patios that had to be removed to complete such an undertaking. L.F. Exh. 147. Mr. Foreman also explained that, to determine the total cost to repair, one would also add in 18% of the cost for overhead and profit ($27,800 X .18% = $5,004) and 15% as a contingency that the

project would over run the estimate ($270,800 X .15% = $4,170), for a total of $36,974.00 as the cost to repair the damp-proofing.[7]

In determining damages, the jury was instructed under MAI 4.03 to award Appellants the difference between the value of the home as represented and the actual value of the home on the date of sale. MAI thus requires the jury to award the difference in value based on the misrepresentation; it does not allow the jury to award the cost to repair. *See Manning v. ABC Exterminators, Inc.*, 682 S.W.2d 3, 7-8 (Mo. Ct. App. 1984) (when purchasers sued termite company for misrepresenting the extent of termite infestation in house, the proper measure of damages was not the cost to repair, but the difference in the value between the house as represented and the value of the house as it truly was with the full extent of the termite damage known as set forth in 4.03). Susan Schiff, who was knowledgeable about the real estate market, was the only expert at trial to tell the jury how to calculate the diminution in value under 4.03. She also explained to the jury how the cost of repair fit in to the calculation required by 4.03, i.e., the difference in value as represented minus the actual value on the date of sale.

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[7] Appellants did not include in this calculation the cost of reseeding and regrading the lawn following the damp-proofing of the foundation because it was separately itemized, but this would certainly need to be done following removal of the earth around the foundation as part of the damp-proofing process and the jury may well have included this amount in its calculations.

Ms. Schiff testified that the value of the home as represented (*i.e.,* with the damp-proofing) was $560,000, the amount that Appellants paid for the house. She also testified that to determine the actual value of the home with a defect, one would subtract the total cost to repair that defect from the purchase price, and subtract an additional amount equal to 10%-20% of the remaining value of the house, because the confidence in the house, which was a new construction, had been shattered based upon the nature of the defect and the fact that it was a code violation. Tr. III-IV at 16-20. She described the minimal 10% discount as "conservative" and said that a buyer would "probably" take off more. *Id.* at 18. In considering her discount factor of at least 10-20%, Ms. Schiff testified that a buyer of a home in the $500,000 range expects that the house would comply with building codes and be built according to standard construction practices. Because this was not the case here, it would tend to lessen the value of the home even further. *Id.* at 11-12. There was testimony by the inspector for the City of Webster Groves that the lack of damp-proofing was a code violation, and testimony by Appellants' architect, Matt Foreman, that such a condition was substandard construction practice that was not a workman like manner. Tr., 9/27/00 at 11-12 (city inspector) and 79-80 (Foreman). The city inspector also testified that until the code violations, including the damp-proofing, were corrected with the house, the City would not issue an occupancy permit. *Id.* at 13. According to Ms. Schiff, all of these things affect value under MAI 4.03. Tr. III-IV at 16-20.

Based upon Ms. Schiff's testimony alone, the damages for the lack of damp-proofing alone calculate as follows: $560,000 (value of home as represented) minus $36,974 (total cost to repair damp-proofing) = $523,026 minus $104,506 (20%

discounted off of $523,026, the remaining value of the home) = $418,421 (actual value of home without damp-proofing). Accordingly, the difference between the value of the home as represented with damp-proofing ($560,000) minus the actual value of the home without damp-proofing ($418,421) is $141,579.00. The jury awarded less than that. In sum, there is a reasonably rational basis upon which the jury awarded $140,000 for the failure to damp-proof alone, and the Court should reinstate the jury's award. The rationality of the award is also demonstrated by the fact that the jury did not award Appellants $220,000, which was the diminution in value for all of the defects, but rather restricted their award to the damp-proofing, the most costly defect and the defect submitted in the verdict director. The jury followed the instruction and awarded Appellants damages based only on damp-proofing. Even assuming the instruction should have somehow been modified, the Respondents were not prejudiced by the instruction based on the evidence of damages for the damp-proofing alone.

In finding that Appellants damages were limited to $35,520 under MAI 4.03, the appellate court misunderstood Ms. Schiff's testimony. The court found that Ms. Schiff would discount the value of the house by 10-20% of the *cost of repair.* Ms. Schiff's testimony, as outlined above, was that a buyer would discount the house by 10-20% of the *remaining value of the home* after the cost of repair was deducted. Based on her testimony, the difference in value based on the damp-proofing alone was $141,579. The Court should reinstate the jury's award of damages.

V. THE TRIAL COURT AND APPELLATE COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES FOR ALL RESPONDENTS BECAUSE

THE JURY WAS ENTITLED TO AWARD APPELLANTS DAMAGES FOR MORE THAN JUST THE FAILURE TO DAMP-PROOF THE EXTERIOR OF THE FOUNDATION IN THAT THE VESCOVO RESPONDENTS ACCEPTED RESPONSIBILITY FOR TWO ADDITIONAL CODE VIOLATIONS IN THE HOME AND THE SLOPING PORCH FOR A TOTAL OF $82,250 IN COSTS TO REPAIR RESULTING IN A DIFFERENCE IN VALUE OF $177,800 AND THE GUNDAKER RESPONDENTS WHO WERE JOINTLY AND SEVERALLY LIABLE WITH THE VESCOVO RESPONDENTS DID NOT OBJECT TO THESE CONCESSIONS AT THE TIME THEY WERE MADE TO THE JURY.

Inexplicably, the Vescovo Respondents argued to the jury in closing argument that the jury should award damages to the Appellants for things other than damp-proofing. Counsel for the Vescovos stood before the jury and told them to award Appellants damages for repairing the roof to correct the code violations related to the roof, for damp-proofing the foundation, for restructuring and repairing the small porch on the home, and for other miscellaneous items such as tightening anchor bolts and reseeding the lawn. Specifically, Vescovo Respondents' counsel told the jury:

> Remove existing roofing, install new flashings, building felt and asphalt shingles. . . . In order to get this house up to code, this needs to be done.

(Tr. III-IV at 621, lines 16-22).

Let's talk about the next thing, excavate existing foundation, clean concrete, apply foundation waterproofing, reinstall patios. Does this need to be done? Absolutely, no question.

(Tr. III-IV at 622, lines 1-4).

Restructure and repair the front porches. Not both porches, but the small porch has settled. And looks like this. Does my client want that fixed? Yes. Did they misrepresent anything about that? No. Why do they want it fixed? Because they want to make sure that this house, when people come up to it, they are impressed, people are impressed with Vescovo Building.

(Tr. III-IV at 622, lines 19-25, and at 623, line 1).

Regrade and seed lawn as required. You know what? That goes over here with the cost of excavating and fixing. We agree that needs to be done. You are not going to put it back in and have it all dirty. You are going to regrade and seed it.

(Tr. III-IV at 623, lines 14-18).

If they're coming out to tighten anchor bolts, I guess they don't bring a wrench. That needs to be fixed.

(Tr. III-IV at 623, lines 7-9).

Tighten anchor bolts. Two hundred fifty dollars. You know what? I'm going to give you that one. We will put that up. . . . I think the anchor bolts do need to be tightened up.

(Tr. III-IV at 625, lines 11-15).

At the end of her closing, counsel for the Vescovo Respondents instructed the jury:

> What we have left is these numbers. We have twenty-six thousand, twenty-seven thousand, twenty-nine thousand two hundred fifty dollars. That is what it would cost to fix this property, according to their expert, if you only take into account those defects related to this case. My client's been willing to pay that since day one to get this house fixed up. Do the right thing. That is what the verdict should be[.]

(Tr. III-IV at 626, lines 4-13).

The Vescovo Respondents thus conceded a total of $82,250 in costs to repair these items, and told the jury that is what they should base their verdict on. Under Ms. Schiff's testimony, the only evidence that the jury heard regarding how to determine difference in value under 4.03, the calculation should be done as follows: $560,000 (value as represented) minus $82,250 (cost to repair) = $477,750 minus $95,550 ($477,750 X .20% discount factor) = $382,200 as the actual value of the home on the date of sale. Thus, the difference between the value as represented ($560,000) minus the actual value on the date of sale ($382,200) is $177,800. Under the Vescovo Respondents' admissions in open court, the jury could have awarded Appellants up to $177,800.

When a defendant in its pleadings or by its counsel in open court or by its evidence admits plaintiff's claim, it cannot be heard to later complain. *See, e.g., Rogers*

v. Thompson, 265 S.W.2d 282, 287 (Mo. Banc 1954). Moreover, the court can instruct the jury to find liability against the defendant and in favor of plaintiff based on pleadings, statements of counsel in open court or the evidence presented by defendant. *Id.* at 287 (approving of directed verdict for plaintiff in case where defendant's evidence presented no real contest over the fact that employees of defendant were negligent; reversing and remanding case because defendant was entitled to submit damages instruction reducing amount of damages awarded to plaintiff). In addition, the jury is not allowed in a negligent misrepresentation by omission case to award only the cost of repair as damages. *See Manning*, 682 S.W.2d at 7-8 (the proper measure of damages was not the cost to repair, but had to be the difference in the value between the house as represented and the value of the house as it truly was under 4.03). The statements by counsel for Vescovo Respondents' closing arguments may have been an attempt to limit the jury's award to $82,250 for the cost to repair, but the evidence by Ms. Schiff was that cost to repair was merely a factor in determining the difference in value under 4.03, the instruction setting forth the proper measure of damage. Thus, following the proper instruction given in 4.03, the jury could have awarded Appellants $177,800 based on the Vescovo Respondents' concessions in open court during closing argument.

Although the Gundaker Respondents were fully aware that the trial court was submitting the Appellants' claims as joint and several against both the Vescovo Respondents and the Gundaker Respondents, the Gundaker Respondents did not object to the Vescovo Respondents' concessions during closing argument. Nor did the Gundaker Respondents even discuss damages in their closing. Although Gundaker made a running

objection at the beginning of trial to the *admissibility of evidence* of defects other than the damp-proofing, it was incumbent upon them to object to concessions affecting their liability during closing. Respondents do not contest that evidence of the existence of other defects properly was admitted for purposes of Appellants' other claims, which ultimately were not submitted to the jury. Given that the evidence was properly admitted, the Gundaker Respondents had to object again during closing to what they perceived as improper argument or flat out admissions by the Vescovo Respondents as to other defects. Missouri law is well settled that "when no objection is made to improper arguments, there is nothing for review on appeal, and the failure to request the court to instruct the jury to disregard an improper argument also constitutes a waiver." *See Krenski v. Aubuchon,* 841 S.W.2d 721, 728 (Mo. Ct. App. 1992), *overruled on other grounds, Rodriguez v. Suzuki Motor Corp.,* 936 S.W.2d 104 (Mo. 1996). Thus, the Respondents cannot claim prejudice by the $140,000 award when the Vescovos conceded a damages award of $177,800 in closing and Gundaker watched in silence. Under such circumstances, none of the Respondents should be entitled to a new trial as to damages.

CONCLUSION

For the reasons set forth above, the Court should reverse the circuit court's granting of a new trial in favor of Respondents and reinstate the jury's verdict.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By:_____

Don M. Downing, MO Bar #30405
Sandra J. Wunderlich, MO Bar #39019
Carrie Mulholland Brous, MO Bar #44920
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Phone: (314) 259-4500
Fax: (314) 259-4599

ATTORNEYS FOR MARY CATHERINE LOWDERMILK, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF GREGORY A. LOWDERMILK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent **via hand delivery**, postage prepaid, on this ____ day of October, 2002, to:

Paul F. Devine
Vatterott, Shaffar & Dolan, P.C.
2458 Old Dorsett Road, Suite 230
Maryland Heights, MO 63043
Attorney for Gundaker Real Estate Company, Inc.,
Beth Gundaker-Lisk, and Larry Wilson

Beth C. Boggs
Boggs, Backer & Bates, L.L.C.
7912 Bonhomme Ave., Suite 400
St. Louis, MO 63105

Robert C. Jones
Linda Grady
Jones, Korum, Waltrip & Jones
120 S. Central, Suite 450
Clayton, MO 63105
Attorneys for Vescovo Building & Realty Co.,
Robert E. Vescovo and Gary Vescovo

_____
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 15,234 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

STINSON MORRISON HECKER LLP
Don M. Downing, MO Bar #30405
Sandra J. Wunderlich, MO Bar #39019
Carrie Mulholland Brous, MO Bar #44920
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Phone: (314) 259-4500
Fax: (314) 259-4599

ATTORNEYS FOR MARY CATHERINE LOWDERMILK, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF GREGORY A. LOWDERMILK